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THE COMMITTEE ON PUBLICATIONS

NEW JERSEYANS FOR A DEATH  
PENALTY MORATORIUM,

Plaintiff(s)

v.

NEW JERSEY DEPARTMENT OF  
CORRECTIONS AND DEVON BROWN,  
Commissioner of the New  
Jersey Department of  
Corrections,

Defendant(s)

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION: MERCER COUNTY

Docket No. MER-L-1740-02

OPINION

CIVIL ACTION

October 28, 2002

David Ragonese, Deputy Attorney General for the New Jersey  
Department of Corrections (David Samson, Attorney General  
and David Ragonese, Deputy Attorney General, on the brief).

Kevin D. Walsh, Esq., Fair Share Housing Center, on behalf  
of the New Jerseyans for a Death Penalty Moratorium (Kevin  
Walsh, Esq. on the brief).

FEINBERG, A.J.S.C.

**NEW JERSEYANS FOR A DEATH PENALTY MORATORIUM v.**  
**NEW JERSEY DEPARTMENT OF CORRECTIONS AND**  
**DEVON BROWN, Commissioner of the New Jersey**  
**Department of Corrections**

**Docket No. MER-L-1740-02**

The Open Public Records Act ("OPRA") N.J.S.A. 47:1A-1 to 13, was approved on January 8, 2002 and became law on July 8, 2002. The OPRA is the legislative embodiment of the State's strong public policy that government records shall be readily accessible for examination to New Jersey's citizens. The changes to the statute are expansive and increase the range of documents that fall within its scope. Under the former statute, a public record was one required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State. See N.J.S.A. 47:1A-2 (repealed July 8, 2002)(emphasis added). Under the revised statute, government records include any document(s) maintained or received by a government official in connection with official business. Government records however, do not include material that is deliberative, consultative, and advisory or information that is protected pursuant to State or Federal law, regulation, statute, court order, court rule, or Executive Order of the Governor.

In this action, New Jerseyans for a Death Penalty Moratorium ("NJDPM") sought access to over 400 pages of documents withheld from disclosure by the New Jersey Department of Corrections. ("NJDOC") In denying access to these documents, the NJDOC asserted the deliberative process privilege, Executive Order #26 and various administrative regulations. After an extensive *in camera* review of the documents included in the index of privileged materials, the court determined that a majority of the documents should be released.

As part of its analysis, the court applied the common-law balancing test set forth in Loigman v. Kimmelman, 102 N.J. 98, 112 (1986). The OPRA states that "nothing contained in P.L. 1963, c.73 (C. 47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common-law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency." Under the common law, the person seeking access to the document(s) must show an interest in

the document(s) that outweighs the government's interest in maintaining the confidentiality of the document.

## **BACKGROUND**

New Jersey's Death Penalty, codified at N.J.S.A. 2C:49-1 et seq. (L. 1983, chapter 245) became law on August 6, 1982 and legislation establishing lethal injection as the method of execution was signed into law on July 6, 1983. As part of the legislative mandate, the New Jersey Department of Corrections ("NJDOC") was authorized to adopt regulations to implement the death penalty. Conforming to the standards set forth in N.J.S.A. 52:14B-4(a) Standard 144, entitled "Lethal Injection," was promulgated by the Department pursuant to its delegated authority and became effective on November 21, 1983. Standard 144 was incorporated into the Department's Operational Procedure Manuals of the Office of Health Services and Trenton State Prison. Over the years, the NJDOC has recommended and the State has re-adopted the Lethal Injection regulations and standards set forth in N.J.A.C.10A:23. The most recent re-adoption is the subject matter of the current challenge before the Superior Court of New Jersey, Appellate Division, filed by New Jerseyans For a Death Penalty Moratorium ("NJDPM") against the NJDOC.

N.J.S.A. 52:14B-4 requires that notice of any agency rule-making be published in the New Jersey Register. It also requires that the agency describe the content of that notice and requires that after the notice, the agency give interested persons an opportunity to participate in the rule-making process through submissions of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency must incorporate into the adopted rule a concise general statement of its basis and purpose. N.J.S.A. 52:14B-4(a) requires that an agency establish that the agency has met the maximum procedural requirements for conducting rule-making proceedings whether the proceedings are for the purposes of adoption, amendment, or repeal. Whether the NJDOC complied with the standards set forth in the aforementioned statutes is not an issue before this court. That issue, coupled with any other procedural or substantive challenges to the rule-making process, is within the jurisdiction of the Appellate Division.

The issue before this court relates to the request by NJDPM for the release of a series of documents from the NJDOC as part of its rule-making challenge. To the extent that it may relate to a decision by this court regarding whether a particular document is pre-decisional and therefore falls within the protection of the deliberative process privilege, the historical and procedural background outlined by the NJDOC in its brief is included in a footnote.<sup>1</sup> The court notes that the procedural background, set forth in the

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<sup>1</sup> On August 18, 1986, the NJDOC proposed the adoption of N.J.A.C. 10A:16 et seq. and published its proposal at 18 N.J.R. 1662(a). The proposal was adopted in its entirety with substantive changes not requiring additional public notice and comment. On April 6, 1987, the proposal became effective and the Department removed Standard 144, Lethal Injection, from its Administrative Plan Manuals replacing it with N.J.A.C. 10A:16-10, Lethal Injection. Comments received during the public comment period included no references to the Department's proposal to adopt N.J.A.C. 10A:16-10. The newly adopted rule was placed as a subchapter in the Department's regulations governing inmate medical and health services and was set to expire on April 6, 1992. On April 20, 1992, the Department proposed changes to N.J.A.C. 10A:16, Medical and Health Services and published its proposal at 24 N.J.R. 1677(a). It proposed that rules

footnote, has not been challenged. NJDPM does, however, assert that the NJDOC has not met its responsibilities under the law. Once again, that issue is best left to the Appellate Division as they evaluate the pending rule-making challenge.

#### **CATEGORIES OF DOCUMENTS SOUGHT**

The record reflects that on September 4, 2001, the New Jersey Department of Corrections re-adopted the State's regulations on lethal injection. See N.J.A.C. 10A:23-1 to N.J.A.C. 10A:23-2. On December 3, 2001 NJDPM requested forty-two (42) categories of documents relating to the adoption of the lethal injection procedures. On March 5, 2002 the NJDOC provided documents that were responsive to only thirteen (13) of the forty-two (42) categories. On April 9, 2002 NJDOC provided an additional thirty-one (31) pages of documents along with a privilege log relating to the remaining documents. Thereafter, a few additional documents were provided to NJDPM, however, NJDOC has asserted the deliberative process privilege and other provisions of the Right to Know Law, N.J.S.A. 47:1A-1, with reference to the remaining undisclosed documents.

The NJDPM, which has over 10,000 members, is an unincorporated grassroots organization that was formed in the summer of 1999. Through its efforts, NJDPM and its

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for executing persons sentenced to death be re-codified with limited amendments as a separate chapter at N.J.A.C. 10A:23-2, Lethal Injection. The newly codified provision was adopted on May 28, 1992 and became effective on July 6, 1992. According to the NJDOC, the Department received only one comment during the public comment period which expired on July 6, 1992. See 24 N.J.R. 2451. On September 16, 1996, the Department proposed the re-adoption with limited amendments to N.J.A.C. 10A:23 and published its proposal at 28 N.J.R. 4157(a). The re-adoption with amendments was adopted on October 18, 1996 and became effective on October 24, 1996 and November 18, 1996, respectively. The NJDOC represents that no comments were received during the public comment period. The newly re-adopted rule with amendment(s) was set to expire on October 24, 2001. See 28 N.J.R. 4875. By notice dated June 18, 2001, the New Jersey Department of Corrections proposed to readopt and amend N.J.A.C. 10A:23. The proposal submitted by the Department indicated that the regulation was to be readopted in its entirety along with a series of technical amendments, amendments to correct terminology and organization, and two substantive changes. Kevin D. Walsh, Esq., counsel for NJDPM, submitted comments regarding that proposal by letter dated July 18, 2001 addressed and delivered to the Office of Policy and Planning, Department of Corrections, Trenton, New Jersey. See 33 N.J.R. 2012 and 33 N.J.R. 2991. On September 4, 2001, the Department adopted the proposal with a substantive change and responded to Mr. Walsh's comments. See 33 N.J.R. 2991.

members are supporting legislation that would create a moratorium on executions and are challenging the recently re-adopted and amended lethal injection regulations promulgated by the NJDOC. Approximately six months prior to filing a complaint in lieu of prerogative writs in the Superior Court of New Jersey, Law Division, Mercer County, seeking the release of documents, NJDPM filed a rule-making challenge before the Appellate Division. As part of its rule-making challenge, NJDPM requested the disclosure of documents. On September 11, 2002 the Appellate Division remanded the case to the Superior Court, Law Division, Mercer County, for an in camera hearing on the part of the motion filed in the Appellate Division that dealt with the release of documents. After consultation with the Appellate Division, on September 30, 2002 this court entered an order consolidating the issues raised in the remand with the relief sought in the complaint in lieu of prerogative writs filed in the Law Division.

In its prayer for relief, the NJDPM sought an order directing the NJDOC to release 80 documents (402 pages) and seeking complete un-redacted access to 7 documents (80 pages) that the NJDOC has provided in redacted form. These documents, for ease of reference, will be referred to collectively as Volume One and Volume Two, respectively. The NJDOC asserts that the 80 documents (402 pages) identified in Volume One fall within the deliberative process privilege or are otherwise exempt from disclosure under N.J.S.A. 47A:1-1 et seq. and that the 7 documents (80 pages) identified in Volume Two are protected from disclosure pursuant to the RTKL. Finally, the NJDOC asserts that with regard to all of the materials listed in Volumes One and Two, any interest by NJDPM in the release of these documents is far outweighed by the interest of the public in non-disclosure.

In its answer the NJDOC asserted that the deliberative process privilege extends to the four categories of documents identified in Volume One.<sup>2</sup> These include: (1) the execution manuals provided by the States of Virginia and Illinois; (2) minutes from the Capital Sentencing Unit (“CSU”) Committee; (3) a series of inter-agency and intra-agency memoranda; and (4) a series of cover letters and draft regulations and draft standards prepared by NJDOC staff.

With reference to Volume Two, consisting of the 7 documents produced in redacted form, the NJDOC asserts that all of the documents include information that, if released to the public, would compromise the security and safety of the process, the institution, its staff and the residents within those institutions. These include: (1) Policy/Procedure of the New Jersey State Prison and Appendix (Un-redacted), Lethal Injection, dated February 27, 1984; (2) Policy/Procedure of New Jersey State Prison (Redacted), Lethal Injection, dated February 24, 1984, Revised September 5, 2001; (3) Policy/Procedure of New Jersey State Prison (Redacted), Capital Sentence Unit, dated October 20, 1999, Revised April 12, 2000; (4) New Jersey State Prison Operational Procedure #105 (Redacted), Lethal Injection, Dated August 1999; (5) Lethal Injection Administrative Checklist (Redacted), Undated; (6) Execution Process Checklist (Redacted), Undated; and (7) Partial Floor Plan at New Jersey State Prison (Redacted), Undated.

### **ORDER TO COMPLY WITH THE VAUGHN INDEX REQUIREMENTS**

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<sup>2</sup> In a supplemental brief filed with the court in October 2002, the NJDOC asserted that Executive Order #26 and provisions of the New Jersey Administrative Code also applied and protected these documents from disclosure.



Upon receipt of the materials from the Appellate Division the Law Division began to undertake a complete and thorough review of the withheld documents. Notably absent from the materials was a detailed index of privileged documents. Therefore, on or about October 7, 2002 the court initiated a telephone conference with counsel for both parties to discuss and review the index of privileged documents provided by the NJDOC. During the telephone conference, the court advised the New Jersey Deputy Attorney General (“DAG”) assigned to the case that the index provided to the court failed to identify the specific reasons for not releasing each of the documents. Rather than merely providing general assertions of privilege, the court directed that the agency identify the specific reason(s) for non-disclosure for each document or communication that the agency sought to withhold in order to comply with the “Vaughn index.” This index, named for Vaughn v. Rosen, 484 F.2d 82 (D.C.Cir.1973) mandates that the agency identify a specific reason for withholding documents. The court in Vaughn stated that in a large document, it is necessary that the agency specify in detail which portion of the documents are subject to disclosure and which are not. Id. at 827. Noting that a “Vaughn Index” should explain why each document is privileged, the court provided the NJDOC the opportunity to cure the defect and provide an amended index of privileged documents.

### **REVISED INDEX OF PRIVILEGED DOCUMENTS**

Consistent with the court’s request, on October 11, 2002 the NJDOC submitted a revised index of privileged documents. In addition to providing a more detailed reason for each of the documents withheld, the NJDOC also revised the index of privileged documents and decided to release to the NJDPM, in full or redacted form, a series of documents contained in Volume One. These include the following:

**DOC006, 007, 008, 009, 012, 013, 014, 015, 016, 017, 018,  
019, 020, 021, 022, 023, 024, 025, 026, 027, 028, 029, 030,  
031, 032, 033, 034, 035, 069, 070, 071, 072, 073, 074, 075,  
183, 184, 186, 187, 188, 189, 190, 191, 192, 193, 194, 198,  
273, 274, 275, 277, 278, 279, 280, 281, 283, 284, 285, 298,  
344, 345, 346, 347, 348, 349, 352, 353, 354, 384, 385, 386,  
387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398,  
399, 400, 401, 402.**

The materials previously released are contained in the Statement of Items Comprising the Record on file with the Superior Court, Appellate Division. For informational purposes only, the court notes that the revised index of privileged documents provided by the NJDOC did not include a chronological and/or complete numerical review of the documents withheld and did not list a specific reason(s) for the decision by the NJDOC not to release documents. As a result, the task of the court in reviewing each document has been difficult.

The revised index and supporting materials provided on October 11, 2002, and listed herein, did not include an analysis by the NJDOC with reference to the redacted portions of documents contained in Volume II. On October 15, 2002, the court directed that the NJDOC provide this additional information on or before October 17, 2002. On October 17, 2002, the court received a revised confidential log of privileged documents for materials contained in Volume II. Much of the information previously redacted in Volume II has now been released to NJDPM.

### **POSITION OF THE PARTIES**

Plaintiff argues that the Department's refusal to release the documents requested by Plaintiff violates the New Jersey Right to Know Law, N.J.S.A. 47:1A-1 et seq. NJDPM argues that the documents at issue are "government record[s]" as defined by the Right to Know Law and thus must be released for inspection in complete and non-redacted form. NJDPM also argues that the documents at issue must be released pursuant to the common law right of inspection. NJDPM argues that it possesses the requisite valid interest in the documents and that its interest in inspecting the documents outweighs the State's interest in their confidentiality.

Defendant argues that the documents are protected from disclosure by the deliberative process privilege, Executive Order #26 and provisions of the New Jersey Administrative Code. As such, Defendant submits that the documents are exempt from the broad scope of the Right to Know Law. Defendant also asserts that, even when applying the common-law balancing test, the plaintiff's interest in inspecting the documents does not outweigh the State's interest in their confidentiality. Thus, Defendant argues that the documents at issue should not be released.

## **ANALYSIS**

This court has reviewed all of the documents already provided to NJDPM by the NJDOC and all of the documents withheld completely or redacted, in part, by the NJDOC. Due to the voluminous nature of the task before the court, and for clarity, in Part I the court will review each of the four categories of documents identified in Volume I. In Part 2, the court will review the materials included in Volume II. In Part III, the court will address the legal principles that apply to one or more of the documents considered by the court, in Part IV, the court will apply the appropriate legal standard to the each specific category of documents, and in Part V the court will review each document separately and evaluate whether the document is subject to a privilege and, if so, whether it should be released.

Part VI, the conclusion, will also direct the submission of an order consistent with the opinion of the court.

## **PART ONE**

### **A. DRAFT REPORTS AND DRAFT REGULATIONS**

The NJDPM contends that the drafts of the administrative regulations in the possession of the NJDOC are not exempt under the deliberative process privilege: (1) because those documents are intended by their author to be distributed to the public and thus are not subject to an expectation of confidentiality; (2) because draft administrative regulations are required to be included in the administrative record as part of the Statement of Items Comprising the Record pursuant to R. 2:5-5(a); and (3) because it

would be inequitable to permit the NJDOC to assert the deliberative process privilege when it acknowledges that it has failed to maintain the documents supporting its lethal injection regulations as required by law.

**I. NJDPM argues that drafts of administrative regulations are intended by their author to be distributed to the public and are thus subject to virtually no expectation of confidentiality.**

The NJDPM contends that drafts of administrative regulations and draft reports are not protected by the deliberative process privilege since it is anticipated that drafts of regulations will be distributed to the public. According to NJDPM, the drafters of regulations, unlike the drafters of internal memoranda, should be aware that the documents they are drafting may some day be published in the New Jersey Register, or the New Jersey Administrative Code, and then be the subject of public scrutiny in the rule-making process.

In response, the NJDOC asserts that the members of a governmental agency operate in an environment in which they assume that drafts developed by staff and high-ranking officials, engaged in the internal rule-making process or the development of policies and procedures, will not be shared with the general public. Relying on the deliberative process privilege, NJDOC contends that all of the draft regulations and reports included in the index of privileged documents were developed as part of a process designed to encourage staff and public officials to engage in a free, open and frank discussion of pending regulations over a period of time. As a result, the NJDOC submits that the disclosure of these discussions would jeopardize the give and take that is part of the rule-making process and would contravene the goals and objectives of the deliberative process privilege.

**II. NJDPM argues that draft administrative regulations are required to be included in the administrative record as part of the Statement of Items Comprising the Record pursuant to R. 2:5-5(a).**

The NJDOC asserts that the deliberative process privilege permits the agency to withhold from public view documents related to its promulgation of administrative regulations, including the drafts of administrative regulations. NJDPM contends that this position is inconsistent with the standard of R. 2:5-5(a) and fundamental administrative law precepts, and should therefore be rejected. R. 2:5-5(a) requires agencies to provide rule challengers and the Appellate Division with documents that support its rulemaking decision.

N.J.A.C. 1:30-5.6 (“rule-making record”) mandates only that specific procedural documents involved with the rule-making process shall be retained, such as OAL rule-making forms, public comments, and an agency’s responses to those comments. Despite this limitation, NJDPM asserts that R. 2:5-5(a) contemplates the creation and maintenance of a broader rule-making appellate record that includes both procedural documents and documents that support the assertions in and underlying the regulations by providing that “[a] party who questions whether the record fully and truly discloses what occurred in the court or agency below shall apply on motion” to that agency or the court.

Relying on that language, the NJDPM argues that R. 2:5-5(a) focuses on the substance of the rulemaking, not the procedural technicalities reflected in OAL forms. Thus, when a rulemaking decision is appealed to the Appellate Division, NJDPM asserts, the record may be expanded pursuant to R. 2:5-5(a) to resemble, for instance, the more thorough record of an adjudicative administrative proceeding.

**III. NJDPM argues that it would be inequitable to permit NJDOC to assert the deliberative process privilege over draft administrative regulations when it**

**acknowledges that it has failed to maintain the documents supporting its lethal injection regulations as required by law.**

On January 31, 2002, the Appellate Division granted a motion by NJDPM to settle the record. The Appellate Division directed the NJDOC to create an amended administrative record as follows: (1) all non-privileged material in respondent's possession relating to the original adoption of the regulation shall be included by respondent in the Statement of Items Comprising the Record; (2) any relevant privileged information respondent has shall be identified by a brief description of the nature of the material and the basis upon which privilege is asserted; and (3) any material no longer in respondent's possession of which respondent is aware that was considered at the time of the original adoption shall be identified by nature with an explanation of why the document cannot be reconstructed.

NJDPM asserts that the decision by the Appellate Division to expand the scope of documents considered a part of the record establishes that the NJDOC failed to maintain documents required by law and that this failure is relevant to its application for the release of documents. The NJDOC responds by disputing the allegations that it failed to maintain an appropriate record for appellate review.

**B. CAPITAL SENTENCING UNIT MINUTES**

In the initial index of privileged materials, NJDOC refused to release any portions of the Capital Sentence Unit ("CSU") minutes.<sup>3</sup> In the revised second index of privileged materials, provided on October 11, 2002, the NJDOC released all of the CSU

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<sup>3</sup> N.J.A.C. 10A:4-4.1 provides that "persons sentenced to death pursuant to N.J.S.A. 2C:11-3 shall be assigned to the Capital Sentence Unit (C.S.U.) until such time that the execution is carried out or in the alternative, that the sentence is commuted or otherwise changed to a lesser penalty."

minutes in full or redacted form.<sup>4</sup> For those documents that have been released in redacted form, the NJDOC submits that those portions represent materials that are deliberative in nature, protected by Executive Order #26 or are not subject to disclosure based on specific sections of the New Jersey Administrative Code. Furthermore, applying the common-law balancing test, the NJDOC asserts that NJDPM has failed to establish that its interest in these documents in its pending rule-making challenge outweighs the interest of the NJDOC in withholding these documents.

To determine whether the minutes from a particular meeting are deliberative and therefore protected from disclosure or consist of merely factual reports or non-policy-level issues, the court is required to review each document. Whereas discussions about policy-level matters, for example whether to execute minors and whether to change Parole Board regulations, are more traditionally deliberative in nature and are thus more likely to be protected, most of the minutes from the CSU Committee appear to reflect factual information and non-policy level issues. See In Re the Liquidation of Integrity Co., 165 N.J. 75, 84 (2000)(“Purely factual material that does not reflect deliberative processes is not protected”).

All of the documents identified in this section are minutes of the CSU, most of which contain factual information. Parts of documents, however, include the comments and information exchanged between staff and public officials that establish the on-going discussion of policy and procedures that are deliberative in nature. Additionally, several portions of the CSU minutes include medical and psychiatric information regarding specific inmates that NJDOC asserts, if released, may jeopardize the security and orderly

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<sup>4</sup> The court notes that most of the CSU minutes have been released in their entirety.



operation of the facility thereby offending Executive Order #26 and portions of the New Jersey Administrative Code.

**C. INTER-OFFICE MEMOS**

NJDOC asserts that inter-office communications that include comments to the proposed re-adoption of, and amendments to N.J.A.C. 10A:23, as well as comments to proposed changes to New Jersey's death penalty statute, fall within the deliberative process privilege and should be protected. Relying on the deliberative and consultative nature of the privilege, the NJDOC submits that since NJDPM has failed to show a compelling need in their disclosure, the documents should be protected. Alternatively, NJDOC asserts that after applying the common-law balancing test these documents should not be released.

The record reflects that many of the documents included in the index of privileged documents contain inter-office and intra-office communications. The issue therefore is whether the documents contain deliberative or consultative material that is protected from disclosure or whether the materials consist of purely factual information that should be released. In reference to inter-office and intra-agency communications the court must also determine whether any documents are protected from disclosure based on Executive Order #26 and related portions of the New Jersey Administrative Code ("Code") that protect information regarding a specific inmate, the author of certain confidential information or information that if disclosed, might jeopardize the security and orderly operation of the correctional facility. Once again, each document must be reviewed independently. In addition, if the documents are not protected, the court must also

consider whether, after applying the common-law balancing test, the documents should be disclosed.

**D. EXECUTION MANUALS FROM VIRGINIA AND ILLINOIS**

First, NJDOC contends that the execution manuals sent from Virginia and Illinois should not be disclosed because they are protected by the deliberative process privilege and the NJDOC has a compelling interest in protecting them. According to NJDOC, these documents, which were made prior to the adoption of the regulations challenged here, were given to the NJDOC by the government agencies of other States as a form of recommendation on death penalty procedures. The NJDOC requested these documents in an effort to secure from the officials of other States a description of the death penalty procedures selected as preferable in those jurisdictions and to provide the State with the opportunity to explore policy alternatives. As a result, requiring the NJDOC to disclose these out-of-state manuals would discourage the free flow of ideas among the States. The deliberative process of our State governmental agencies would, therefore, be inhibited.

In addition, NJDOC argues that the need to protect these execution manuals from the States of Virginia and Illinois are supported by the certifications submitted by governmental officials from both States representing the confidential nature of these documents. Moreover, NJDOC submits that these documents are not and should not be considered relevant to the challenge by NJDPM to the adoption of regulations in the State of New Jersey.

NJDOC asserts that the execution manuals from the States of Virginia and Illinois are deliberative in nature and should be protected. To support this position, NJDOC submits that the manuals were considered by the agency in formulating its Death penalty procedures. In fact, as the affidavit of Gene M. Johnson, Deputy Director for the

Division of Operations, Virginia Department of Corrections, makes clear, the Virginia Department of Corrections execution manual was sent "to assist [New Jersey] in updating their manual." Affidavit of Gene Johnson ("Johnson Aff."), dated July 30, 2002 at ¶ 4. NJDOC asserts that the inescapable conclusion must be that the documents contained in the privilege log are both pre-decisional and deliberative in nature.

**PART TWO**

**VOLUME TWO**

NJDPM contends that although the NJDOC has provided no reason for doing so, it has heavily redacted 7 documents (80 pages), all of which are public records.<sup>5</sup> NJDPM argues that because these documents are public records no grounds exist to support the redaction of information. In addition, NJDPM asserts that the common law right to know would lead to the same result. Further, NJDPM requests an order requiring NJDOC to provide them with a complete copy of the "Lethal Injection, Administrative Check List [sic]." The court notes that the "Lethal Injection Administrative Checklist" consists of 14 pages. The pages are marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 19. NJDPM requests that NJDOC provide pages 14, 15, 16, 17, and 18. In response, NJDOC submits that the document consists of only 14 pages and that page 19 should have been numbered page 14.

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<sup>5</sup> The court notes that many of the redacted lines have now been released in the revised index of privileged documents provided to the court and counsel for NJDPM on October 17, 2002.

Once again, the court must evaluate each document to determine whether the documents are protected by the deliberative process privilege, Executive Order #26, the Administrative Code or are otherwise available applying the common-law balancing test.

### **PART THREE**

#### **LEGAL ANALYSIS**

Responding to requests by NJDPM for the disclosure of documents, the NJDOC asserts that: (1) the deliberative process privilege; (2) Executive Order #26; and (3) the provisions of the New Jersey Administrative Code, more specifically, N.J.A.C. 10A:23-2.3(1)(2) and (4), support the non-disclosure of draft regulations and draft reports, inter-office and intra-agency communications, the execution manuals secured from the States of Virginia and Illinois, the minutes of the Capital Sentencing Unit Committee and the seven redacted documents included in Volume II of the revised second index of privileged materials.

Finally, the NJDOC asserts that applying the common law balancing test, the interest of NJDOC in nondisclosure outweighs any interest of NJDPM in the release of these documents.

#### **A. THE RIGHT TO KNOW LAW**

The decisional law interpreting the Right To Know Law ("RTKL") has evolved since the statute's initial

enactment, however, the New Jersey Legislature recently completed a substantial revision of the Right to Know Law. See Assembly Bill 1309, 2000-2001 Session. enacted as P.L. 2001, c. 404. The Open Public Records Act, ("OPRA") N.J.S.A. 47:1A-1 to 13, became law on January 8, 2002. The changes to the statute are expansive and increase the range of documents that fall within its scope. See generally N.J.S.A. 47:1A-1.

The OPRA states in relevant part:

The Legislature finds and declares it to be the public policy of this State that: government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented, shall be construed in favor of the public's right of access;

all government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order;

a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal

information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy; and nothing contained in P.L.1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency.

Although the revised statute has yet to be considered by a New Jersey Court, its more limited predecessor was consistently interpreted to afford New Jersey citizens broad access to public records. See Irval Realty Inc. v. Bd. of Pub. Util., 61 N.J. 366 (1972).

Under the OPRA, the right to inspect public documents requires only that the documents be "government record[s]" as defined by the statute. N.J.S.A. 47:1A-1. The key difference between the former statute and the revised version is the Legislature's expansion of the definition of "government records." See N.J.S.A. 47:1A-2 (repealed July 8, 2002). The Legislature's revisions significantly altered the definition of a "government record,"<sup>6</sup> resulting in a dramatic expansion of the range of documents that fall within the scope of the statute. N.J.S.A. 47:1A-1.1.

Under the former statute, a public record was a document that was required by law to be made, maintained or kept on file by any board, body, agency, department,

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<sup>6</sup> The previous statute used the term "public records." The OPRA uses the term "government records." See N.J.S.A. 47:1A-1.

commission or official of the State. See N.J.S.A. 47:1A-2 (repealed July 8, 2002)(emphasis added). By contrast, OPRA does not contain the "required by law" language of its predecessor, and defines a "government record" as:

...any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[N.J.S.A. 47:1A-1.1.]

The revised statute's expanded definition of "government record[s]" thus appears to apply to nearly all government records not specifically exempted in the Right to Know statute itself, or otherwise.<sup>7</sup>

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<sup>7</sup> In addition to the categorical exemption for "inter-agency or intra-agency advisory, consultative, or deliberative material," the statute also contains enumerated exemptions for other sensitive material as well as a broad exemption for documents made confidential pursuant to another specific statute. See N.J.S.A. 47:1A-1.1.

The OPRA is the legislative embodiment of the State's strong public policy that government records shall be readily accessible for examination by New Jersey's citizens. N.J.S.A. 47:1A-1.1 It includes, however, numerous provisions that exempt certain specifically enumerated records from public inspection for the protection of the public interest. N.J.S.A. 47:1A-1.1. In addition to the categorical exemption for "inter-agency or intra-agency advisory, consultative, or deliberative material," the statute also contains enumerated exemptions for other sensitive material. See N.J.S.A. 47:1A-1.1. In addition, some documents that might otherwise fall within the scope of "government record[s]" may be exempted from disclosure under the Right to Know Law pursuant to:

...any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order.

[N.J.S.A. 47:1A-1.]

#### **B. Deliberative Process Privilege**

Defendant argues that the deliberative process privilege protects many of the documents and redacted portions of documents withheld by the NJDOC. The deliberative process privilege was formally recognized in New Jersey in Integrity supra, 165 N.J. 75. There, the New Jersey Supreme Court held that while relevance generally creates a presumption of discoverability, confidentiality should nevertheless be maintained if the



government establishes that the privilege exists. Id. at 83. The Court defined the privilege as a "doctrine that permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Ibid. The Court articulated two initial requirements for the deliberative process privilege to apply. First, the document must have been generated before the adoption of the agency's decision. Id. at 84. Second, the document must be "deliberative". Ibid. (citing Coastal States Gas Corp v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)). The Court described documents "containing opinions, recommendations, or advice about agency policies" as deliberative in nature. Id. at 85.

The OPRA, N.J.S.A. 47:1A-1.1, provides that government records "shall not include inter-agency or intra-agency advisory, consultative, or deliberative material." If the privilege applies, a party seeking to pierce the privilege may overcome the presumption against disclosure only if "the need for fact-finding override[s] the government's significant interest in non-disclosure." Integrity, supra, 165 N.J. at 85. The standard for overcoming the burden against the party seeking the documents is "substantial" or

compelling." Ibid. It is against the public interest "in all but exceptional cases" to allow disclosure if the privilege exists. Ibid. (quoting E.W. Bliss Co. v. United States, 203 F. Supp 175, 176 (N.D. Ohio 1961)).

When determining whether a litigant has overcome the presumption against nondisclosure, factors to consider include: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. Integrity, supra, 165 N.J. at 85-86. The Court cautioned against a "wooden" application of the notion of confidentiality and warned that merely characterizing a document as deliberative is not dispositive and that withholding discoverable factual material by placing it in a deliberative document would not be countenanced. Id. at 86 (citing McClain v. College Hosp., 99 N.J. 346, 360-61 (1985)).

Courts have repeatedly recognized the need for government agencies to engage in the free and open exchange of ideas in the development and implementation of new policies and procedures. In Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 151, n. 18 (1975), the United States Supreme Court stated:

Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific

decision in connection with which memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies.

The deliberative process privilege protects communications that are part of the decision making process of a governmental agency. The purpose of the privilege is to “prevent injury to the quality of agency decisions.” Ibid. Frank discussion of legal or policy matters in writing might be inhibited if the discussions are made public; and the discussions and policies formulated would be the poorer as a result. Ibid. Thus, to protect the “decision making process of government agencies, documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated” comprise deliberative process material and are entitled to non-disclosure under common law privilege principles. Ibid.

Despite this protection, factual information shall be discoverable unless it is “inextricably intertwined” with the deliberative information. Envtl. Prot. Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, 837, 35 L.Ed 2d 119, 132 (1973). Courts have historically taken the position that factual information that is not subject to the deliberative process privilege, can “be separated out and disclosed“ without impinging on the policymaking decisional processes intended to be protected by this exemption”. Ibid. Relying on the deliberative process privilege, the NJDOC submits that it has met the two-part test established by the courts and that NJDPM has failed to overcome the presumption of non-disclosure.

Relying on the deliberative process privilege and the inter-office and intra-agency exemptions included in the OPRA coupled with Executive Order #26 and the provisions

of the Administrative Code, the NJDOC asserts that it has properly withheld documents or redacted sections of documents listed in the revised index of privileged materials.

If the court determines that a privilege exists or that an agency is entitled to withhold documents, the next issue is whether the applicant has demonstrated a compelling need to disclose the documents that substantially outweighs the agency's interest in protecting them. As noted by Justice Long in In the Matter of Liquidation of Integrity Insurance Company:

Despite the existence of the privilege, with its concomitant presumption against disclosure, a litigant may obtain deliberative process materials if his or her need for the materials and the need for accurate fact-finding override the governments' significant interest in non-disclosure.

As with any privilege, the party seeking such documents bears the burden of showing a substantial or compelling need for them. **In all but exceptional cases it is considered against the public interest to compel government to produce inter-agency advisory opinions.**

[Integrity, supra, 165 N.J. at 85, (citations omitted)(emphasis added).]

"The initial focus must be upon the nature of the materials sought... [and] the relative interests of the parties in relation to these specific materials." Id. at 87.

Implicit in each assessment is a consideration of consequences -- i.e., the consequences to the litigant of nondisclosure, and the consequences to the public of disclosure.

The consideration of the consequences of disclosure to the public will involve matters relative to the effect of disclosure upon the integrity of public processes and procedures. This standard . . . is flexible and adaptable to different circumstances and sensitive to the fact that the requirements of confidentiality are greater in some situations than in others

**As the considerations justifying confidentiality become less relevant, a party asserting a need for the materials will have a lesser burden in showing justification. If the reasons for maintaining confidentiality do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a compelling need.**

[Ibid. (citations omitted and emphasis added).]

NJDPM asserts that its interest in the release of the draft regulations and draft reports, inter-office and intra-office communications, the CSU minutes, the execution manuals from the States of Illinois and Virginia and the 7 redacted documents in Volume II outweigh any interest by the NJDOC in protecting these documents. NJDPM submits that its interest, namely the constitutional testing of regulations intended to result in death during this time of public uncertainty about the death penalty, is so compelling that it warrants disclosure. To support this position, NJDPM asserts that courts have historically recognized the significant public interest in capital punishment cases. See State v. Ramseur, 106 N.J. 123, 178 (1987) ("Death is, of course, profoundly different from any other punishment in its severity, finality and deprivation of humanity."); Id. at 326 (quoting Lockett v. Ohio, 438 U.S. 586, 605, 98 S. Ct. 2954, 2965, 57 L. Ed. 2d 973, 990 (1978)("[T]he imposition of death by public authority is . . . profoundly different from all other penalties."). As a

result, NJDPM asserts that the court should develop a flexible and relaxed rule to ensure the greatest level of participation and challenge by those seeking to protect the rights of those condemned to die. NJDPM asserts that the public must play a significant role in these kinds of cases and that therefore liberal access to documents related to the rule-making process should be provided. Ramseur, supra, 106 N.J. at 170-71.

Additionally, NJDPM submits two recent cases, California First Amendment Coalition v. Woodford, 299 F. 3d 868 (9<sup>th</sup> Cir. 2002) and United States v. Quinones, 205 F. Supp. 2d 256 (S.D.N.Y. 2002), support the notion that the public has a right to full and complete access to the standards and manner in which individuals are executed in this country. Relying on these two recent cases, NJDPM submits that its interest in securing this information far outweighs any interest NJDOC has in non-disclosure.

**C. EXECUTIVE ORDER OF THE GOVERNOR**

The New Jersey Right to Know Law ("RTKL") was recently revised to broaden the scope of documents that are accessible to the public. The scope of documents now available for public inspection is significantly larger than under the old version of the statute. The new OPRA

provides that all government records shall be subject to public access unless exempt from such access by: P.L. 1963, c. 73 (C. 47:1A-1 et seq.) as amended and supplemented; any other statute; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the Governor; Executive Order of the Governor; Rules of Court; any federal law, federal regulation, or federal order.

Several executive orders have been enacted with respect to the New Jersey Right to Know Law. Each prior order is still in existence to the extent that it does not conflict with the most recent executive order that has been enacted. On July 8, 2002, the Governor adopted Executive Order #21 followed on August 13, 2002, by Executive Order #26. Upon the enactment of Executive Order #26 it was established that certain records maintained by the Office of the Governor would not be open to public inspection.

In pertinent part, Executive Order #26 provided that certain types of documents would not be considered "government records" and therefore would not be subject to disclosure pursuant to N.J.S.A. 47:1A-1 et seq. Paragraph 4 of Executive Order #26 provides that the following records shall not be considered to be government records

subject to public access pursuant to N.J.S.A. 47:1A-1 et seq., as amended and supplemented:

(b)(1) Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation.

....

(d) records of a department or agency in the possession of another department or agency when those records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.  
[ Exec. Order #26 (2002) ].

#### **D. ADMINISTRATIVE REGULATION**

In addition to Executive Order #26, the NJDOC submits that sections of the New Jersey Administrative Code dictate that certain documents listed in the index of privileged documents should remain confidential. Chapter 22 of Title 10A of the New Jersey Administrative Code governs NJDOC records. NJDOC relies on the provisions set forth in N.J.A.C. 10A:22-2.3 that permit the NJDOC to classify as confidential, certain records that shall not be disclosed to unauthorized persons or agencies. Subsection 2.3 entitled “**Confidential records and information,**” (emphasis added) designates certain types of records as “confidential” and instructs that they “shall not be disclosed to unauthorized persons or agencies.” Among the list of records identified by that section, relevant to this case are paragraphs 1, 2 and 4. Paragraph 1, in relevant part, provides:

Reports that are evaluative, diagnostic or prognostic in nature furnished with a legitimate expectation of confidentiality and which, if revealed to ... others, could be detrimental to the inmate or could jeopardize the safety of individuals who signed the reports, or were parties to the decisions, conclusions or statements.



[N.J.A.C. 10A:22-2.3(a)(1).]

Paragraph 2, includes:

Information the disclosure of which could have a substantial adverse impact on the security or orderly operation of the correctional facility.

[N.J.A.C. 10A:22-2.3(a)(2).]

Paragraph 4, includes:

Disclosures that would jeopardize internal decision making or policy determinations essential to the effective operation of any correctional facility or the Department of Corrections.

[N.J.A.C. 10A:22-2.3(a)(4).]

NJDOC represents that the three provisions set forth above protect the release of documents that: (1) could jeopardize the safety of inmates and individuals who signed reports; (2) could have substantial impact on the security or orderly operation of the correctional facility; or (3) would jeopardize internal decision making or policy determinations essential to the effective operation of any correctional facility of the Department of Corrections and that the RTKL exempts from disclosure inter-agency or intra-agency advisory, consultative or deliberative materials.

Finally, NJDOC cites R. 4:10-2(a), for the proposition that while parties to an action may obtain discovery, that discovery does not include matters that are privileged. As a result, NJDOC asserts that the materials withheld are exempt from disclosure.

Although not cited by the NJDOC, N.J.A.C. 10A:22-2.3, paragraph 7, also lists as confidential,

Such other records as the Commissioner or designee, or Administrator, based on their experience and exercise of judgment, believe must be kept confidential to ensure

maintenance of the safe, secure and orderly operation of the correctional facility and/or the Department of Corrections.

Although not unbridled, this provision allocates to the Commissioner or his designee, or Administrator, a great deal of discretion to withhold documents that could jeopardize the security and safety of the institution and/or its staff.

**E.    The Common Law Right of Inspection**

Historically, in claims brought to compel access to public records a person seeking access to documents that were not classified as public records had the right to seek the release of documents under the common law right of inspection. Under the common law, courts applied a balancing test to determine whether the individual seeking access to the document had a legitimate right to obtain and review the document by establishing that he/she had an interest in the subject matter of the document sought to be obtained. Irval, supra, 61 N.J. at 371-72.

After determining that a plaintiff had standing to request documents and that the documents sought were public records, the common law test requires the court to "balance a plaintiff's interests in the information against the public interest in confidentiality of the documents." South Jersey Publishing Co., Inc. v. New Jersey Expressway Auth., 124 N.J. 478, 488 (1991). Traditionally, courts required that the balancing process should be "concretely focused upon the relative interests of the parties in relation to

[the] specific material." McClain, supra, 99 N.J. at 361.

Among the factors relevant to a court applying the common law balancing test were:

(1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decision-making will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.

[Loigman v. Kimmelman, 102 N.J. 98, 112 (1986).]

Both NJDPM and NJDOC argue the continued existence of the common law balancing test under OPRA. NJDPM argues that should a common law balancing test be applied to documents that are exempt from disclosure pursuant to statute, regulation, or executive order that they should prevail as they have a significant interest in obtaining the documents. NJDPM seeks to obtain the release of the documents in connection with its rule making challenge to New Jersey's re-adoption of N.J.A.C. 10A:23 et seq. NJDPM contends that its interest in obtaining the documents is sufficient to overcome any claim

of non-disclosure as state execution is one of the few matters that is so heavily laden with constitutional issues, and public policy concerns about basic human rights.

The NJDOC also contends that the common law balancing test survives the recent revision to the New Jersey statutory Right to Know Law. However, NJDOC argues that the documents not exempted under a statutory, regulatory or executive order exemption should remain confidential under the balancing test. To support this, the NJDOC submits that the release of these documents would have a significant negative impact its ability to maintain security and would be harmful to the public interest.

The newly adopted version of the New Jersey Right to Know Law, referred to as OPRA, states that "nothing contained in P.L. 1963, c.73 (C.47:1A-1 et seq.), as amended and supplemented, shall be construed as affecting in anyway the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency." N.J.S.A. 47:1A-1. It is clear to the court that N.J.S.A. 47A:1-1 et seq. does not abrogate the common law balancing test. Rather, the Legislature intended to retain the common law right of inspection by affording an applicant the right to seek judicial review and by requiring the court to engage in the traditional common-law balancing test.

The NJDOC submits that the common-law balancing test, which is part of the new law, should be construed in a way that permits the government to deny access even in a

situation when a document is considered a "government record." In essence, the NJDOC contends that because OPRA is so broad the Legislature intended to afford the government the right to withhold documents not protected by the OPRA, based on the notion that there are situations in which the interest of the government in withholding the document outweighs any interest of the applicant in its release.

The court notes that for forty years this State has operated under a Right-To-Know scheme that included statutory and common law rights that were complimentary rather than contradictory. Significantly, the narrow definition of public record under the statutory right was complimented by the broad definition under the common law right. It is undisputed that the OPRA upsets that balance.

The question that arises is whether a public agency can assert the common-law balancing test to protect the disclosure of records when a document falls within the definition of a "government record." In other words, does OPRA permit any discretion with regard to the release of documents seemingly within the statute's broad definition of "government record[s]?" Specifically, may a balancing of interests test, similar to that required under the common law right of inspection, be asserted by a

governmental agency when a request has been made for the release of documents? Under the RTKL, with its narrow definition of the term "public record," the exercise of a common law balancing test by the government was not contemplated. But, what should the standard be now?

In an effort to resolve the application of the common-law balancing test to the release of documents, the court has examined, at length, the legislative history. The sponsors of the revised statute recognized that by making the statute more broad, and without specifying categories of documents that would be exempt, that there would arise situations in which the court should have the discretion to employ the common law balancing test. Issues Dealing with Public Access to Government Records S. 161, 351, 573, and 866, 209th Leg. (N.J. 2000). Portions of the record are worth noting:

In contrast, the citizen's common law right to gain access to the other public records requires a balancing of interest. Now the reason that this is important is because there is a whole host of scenarios that we cannot possibly, in advance anticipate. There are going to be requests for information. Well, we have a good common law balancing test for those items that might be unanticipated, and my only concern about a statute that doesn't recognize that there are different classes of documents is that **we could create a situation where we inadvertently created an unqualified right to many, many documents that will impact on the legitimate privacy interest of citizens of this state.**

[Senator Robertson, page 9 (emphasis added).]

In addition, the Senator noted that we (the Legislature) should "maintain the right of the court to engage in a logical, sensible, balancing" of things that could not be anticipated at the time of the adoption of the statute, and that "if we abandon that, then I think that we will have created something that will have many, many unintended results." Ibid.

The above comments suggest that certain legislators may have anticipated the application of the common-law balancing test to permit the government to withhold documents that were otherwise subject to disclosure under the OPRA. Of course, the common-law balancing test has historically been applied to evaluate a citizen's right to the release of documents. Under the former RTKL, a citizen had an unqualified right to secure documents defined as "public records." Additionally, a citizen had the right to assert a common-law right of inspection to those documents not defined as "public records." Under the common-law balancing test the court engaged in a careful and thoughtful balancing test as a means to weigh the interest of the citizen in the release of a document against the interest of the government in its nondisclosure.

The common-law balancing test, under the former RTKL, did not permit the government to withhold documents that were "public records." If defined as a "public record," the citizen had an absolute right to its release. The common-law balancing test applied only to those documents not considered "public records" and provided the citizen with a complimentary avenue to secure the release of document(s). The common-law balancing test was not interpreted to provide government the right to withhold documents defined as "public records."

In light of the dramatic changes to OPRA, this court has struggled to construct a way to evaluate the release of documents given the new definition of "government records." Does the broad definition of "government records" under the OPRA require a shift in the application of the traditional common-law balancing test. Should the court, while agencies within State government identify documents that should be exempted

from public disclosure<sup>8</sup> in order to protect the public, consider the creation of a new two-part balancing test to avoid unintended results created by the imprudent release of materials not originally contemplated by the Legislature and which may have adverse consequences on the interest of the public? Or will such a test compromise the goals and objectives of OPRA and improperly place the court in conflict with the legislative process?

The NJDOC, in its supplemental brief, while not formulating a new test, has suggested that the new law requires a different approach. Responding to this challenge, and in an effort to balance the interest of the public in disclosure against the potential interest of the government to protect the release of documents, the court has considered adopting a standard as follows:

(1) If the court finds that the document falls within one of the statutory exemptions and is therefore exempt from disclosure under the OPRA, then, the party seeking release shall bear the burden of persuasion under the common law balancing test to establish by a preponderance of the evidence that its interest in disclosure of the document outweighs the government's interest in non-disclosure.

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<sup>8</sup> Executive Order #21, introduced on July 9, 2002, in pertinent part, provided: "whereas, it was necessary for all State agencies to conduct a comprehensive review of all records maintained by that agency, and a thoughtful analysis of those records to determine which of those records should be exempted from disclosure in order to protect the public interest or a citizen's reasonable expectation of privacy; and whereas, that process has been largely completed and the various agencies have identified those documents that should be exempted from public disclosure in order to protect the public interest or a citizen's reasonable expectation of privacy; and whereas, due to the provisions of the Administrative Procedures Act and the implementing regulations adopted pursuant to that Act, the agencies proposed rules will not be finalized until October 1, 2002 at the earliest..."[Introductory paragraphs.]



(2) If the court determines that the document is a “government record” and is not exempt by statute, resolution, executive order, regulation or court rule, then the government shall bear the burden of persuasion under the common law balancing test to establish by clear and convincing evidence that that the government’s interest in non-disclosure outweighs the plaintiff’s interest in the document.

Would such a bifurcated approach, be appropriate? Applying this test, if a document were found to be an exempt “government record” a litigant seeking access would be required to establish by a preponderance of the evidence that their interest in the release of the document outweighed the interest of the government in its nondisclosure. Historically, applicants seeking disclosure of records have borne this standard of proof.

If the court adopted a standard that permitted the government to withhold the release of document(s) even under circumstances where the record was found to be a “government record” that did not satisfy any of the exemptions, would the proposed enhanced burden of persuasion protect the applicant who sought release while at the same time providing a mechanism to ensure that government acted properly and did not offend the goals of OPRA in the open access by the public to public records?

“Clear and convincing evidence, falls somewhere between the ordinary civil standard of the preponderance of the evidence and the criminal standard of beyond a reasonable doubt.” Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960). Recognizing the potential temptation by government to withhold documents, would this increased burden minimize that temptation, thereby protecting the interest of the citizen and the public at large?

While the court drafted this two-part test as part of an analysis to consider alternatives, the court is concerned that if it were adopted the public and the media would perceive this approach as offending the very purpose of the OPRA by permitting government the opportunity to avoid disclosure. Most significantly, such an approach would undoubtedly distort the purpose of OPRA and undermine the time and effort expended by members of the Legislature and members of the public in the development of a comprehensive reform to provide free and unhampered access to government records in this State.

Notably, the OPRA includes an elaborate listing of specific statutory exemptions coupled with the right of an agency within State government to identify its records and, when appropriate, to craft exemptions to the release of documents considered confidential and therefore not appropriate for release. Finally, courts should exercise great caution in creating judicial remedies or interfering with the legislative process in circumstances where there is a well-defined and comprehensive legislative plan.

As a result, after much thought and reflection, the court finds that the common-law balancing test remains under the OPRA but is limited to the right of an applicant to seek the release of a document otherwise considered exempt under the OPRA. It does not provide a mechanism for the government to withhold documents defined as a “government record” where there is no recognized exemption.

As noted heretofore, Executive Order #21 recognized that State agencies were in the process of identifying those documents that should be exempt. Obviously, that process will be a continuing one as agencies within State government continue to

evaluate their procedures, policies and operations and, from time to time, make appropriate changes consistent with the Administrative Procedures Act.

#### **PART FOUR**

### **APPLICATION OF THE LEGAL STANDARD TO SPECIFIC CATEGORY OF DOCUMENTS**

#### **A. DISCLOSURE OF DRAFT REGULATIONS AND REPORTS**

For the most part, the NJDOC relies on the deliberative process privilege to support the non-disclosure of several draft regulations and reports. The court must decide whether or not the deliberative process privilege applies to draft regulations and second, if it does, whether the NJDPM has met its burden to support the release of these documents. It is the position of the NJDOC that drafts of regulations are deliberative in nature and fall within the deliberative process privilege.

The court has carefully reviewed those documents identified by the NJDOC as draft regulations, draft reports and draft procedures. Due to the voluminous nature of these documents, it is impossible for the court to ascertain what portions, if any, of the drafts were ultimately adopted by the NJDOC and included as part of the final regulations. Significantly, the NJDOC has not culled out those sections, if any, contained in the draft regulations that were ultimately adopted in final form.

Despite the failure of the NJDOC to isolate those draft regulations that were ultimately adopted, this court is satisfied that the draft regulations are pre-decisional and that many of them reflect the on-going deliberative and consultative process by which government staff and officials, at all levels of government, engage in the give and take exchange of information and ideas designed to formulate policy and finalize decision-

making. The free and unrestrained exchange of thoughts and ideas is critical to the rule-making process and if communications such as these were exposed, “the candor of government staff would be tempered with a concern for appearances...to the detriment of the decision-making process,” and would thereby deny to agency decision makers the uninhibited advice which is vital to agency decisions. NLRB, supra, 421 U.S. at 150-51.

The protection of draft regulations and draft reports has historically fallen within the protection of the deliberative process privilege. For example, in United States v. Farley, 11 F.3d 1385 (7<sup>th</sup> Cir. 1993), the Seventh Circuit was faced with the Government’s application to protect documents under the deliberative process privilege. The documents consisted of drafts by members of the Federal Trade Commission for future action that may or may not have been implemented. The Court accepted the Government’s characterization of the drafts and identified those recommendations as “clearly part of the FTC’s deliberations.” Id. at 1389.

In Scott v. PPG Industries, Inc., the district court was faced with the question of whether EEOC draft letters of a determination made in connection with discrimination claims the Commission was investigating were discoverable. 142 F.R.D. 291 (N.D.W.Va. 1992). While the issue of disclosure turned on waiver, it was conceded by the party seeking disclosure, and accepted by the Court for purposes of its decision, that the draft letters of determination were deliberative in nature. Id. at 292. See also Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 (D.C.Cir. 1960)(holding that investigative and other factual reports in the files of the Renegotiation Board were subject to disclosure, whereas policy recommendations were held to be privileged); and Kaiser Alum. & Chem. Corp. v. United States, 157 F. Supp. 939 (1958)(holding that prior drafts of a GSA

contract with agency interpretation and justification thereof need not be disclosed under the privilege).

In Archer v. Cirrincione, the district court stated that drafts of proposed regulations could be withheld from disclosure pursuant to the deliberative process privilege. 722 F. Supp. 1118 (S.D.N.Y. 1989). See also Pies v. United States Internal Revenue Ser., et al., 668 F.2d 1350 (U.S. App. D.C. 1981) (holding that drafts of proposed regulations and the transmittal memoranda relating to the documents, which do not reflect the final opinion, are not subject to disclosure); cf. Azon v. Long Island R.R., No. 00 CIV 6031(HB), 2001 WL 1658219 (S.D.N.Y. 2001) (holding that prior drafts that do not contain any additional edits or comments are not pre-decisional).

In Archer the defendant, the Department of Health and Human Services, sought to protect internal drafts of a regulation that contained suggested changes, marginal notes, and analyses of public comments, constituting opinions, conclusions, and advice on preparing the Final Rule. The court held:

The material withheld by HHS consists solely of the ancestry of the Final Rule. The memoranda, drafts and informal written analyses all reflect movement of the agency towards generation of the Final Rule. These documents never had any binding force, and any real significance contained therein was encapsulated in the Final Rule. Similarly, the withheld draft responses to the public comments are direct precursors of the final agency publication of its responses in the Federal Register. Thus all the withheld documents are pre-decisional.

[Id. at 1123.]

The court also determined that the documents reflected the deliberative process of HHS in reaching its final decision. The court stated:

The intra-office memoranda and corrected drafts of the regulation represent the give-and-take between agency officials and are clearly “indicative of the agency’s thought process”, to use the language of the Second Circuit. Local 3, IBEW, AFL-CIO v. NLRB, 845 F.2d 1177,1180 (2d Cir. 1988). As previously noted, the D.C. Circuit has afforded protection under Exemption (b)(5) for the “reasoning and tentative conclusions of agency decision-makers.”

[Ibid.]

Similarly, in the case before this court, the New Jersey Department of Corrections has withheld documents that contained the ancestry of the adopted regulations. The documents contain marginal notes and comments on the proposed regulation, similar to the proposed regulations in Archer. The drafts reflect the thought process of the Department, and have no binding force, therefore, as in Archer, the drafts of the regulations are protected under the deliberative process privilege as pre-decisional documents. In addition, all of the drafts identified in the initial and revised index of privileged documents establish the Department's continuing practice of examining their death penalty regulations. This is most obvious by simply examining the date of the documents.

For the reasons set forth herein, the court rejects the three arguments advanced by the NJDPM to support the release of draft regulations. First, the court finds that draft regulations prepared by staff, agency representatives and officials are not the kind of documents where the author has an expectation that these documents will be subject to public review. Rather, these drafts constitute internal documents circulated among agency personnel that are intended to stimulate frank and open discussion about policy, procedures and rule-making provisions. These internal draft regulations, unlike draft proposals prepared for public distribution and open to public comment, are specifically

intended to remain within the confines of the agency to foster the free and open exchange of ideas. Second, the court rejects the notion that R. 2:5-5 was ever intended to disturb the legitimate exercise of the deliberative process privilege by a governmental agency. Finally, whether the NJDOC has failed to maintain documents required by law to support its rule-making responsibilities is an issue best left to the Appellate Division.

All of these cases recognize that agency drafts of proposed regulations, prepared for intra-agency use, are clearly part of the deliberative process leading to the decision to amend and/or readopt administrative regulations. The drafts withheld by NJDOC reflect the on-going give and take process between staff and public officials engaged in the rule-making process. To release these kinds of documents would clearly inhibit the free and honest feedback so critical to the exchange of ideas that lead to the development of policies and procedures. The court notes that this public policy interest in preserving the free and open exchange of ideas applies with equal force and effect to those draft reports and draft regulations that were issued many years ago. The passage of time does not alter the government's interest in preserving the importance of the process.

Once the government establishes the existence of the privilege, a party seeking to pierce the privilege may overcome the presumption against disclosure only if the "need for fact-finding override[s] the government's significant interest in non-disclosure." Integrity, supra, 165 N.J. at 85. The standard for overcoming the burden against the party seeking the documents is "substantial and compelling." Ibid. It is against the public interest "in all but exceptional cases" to allow disclosure if the privilege exists." Ibid. (quoting E.W. Bliss Co., supra, 203 F. Supp. at 176. This sharing of policies and

procedures between state agencies far outweighs any interest by the NJDPM in the release of these documents.

This court finds that NJDPM has not overcome the burden by demonstrating a substantial or compelling reason and that the interest of NJDPM is outweighed by the government's interest to engage in the unhampered exchange of opinions and alternatives in the realm of public policy, or in what our Supreme Court has characterized as the "free and candid exchange of ideas and opinions between and within government agencies." Loigman, supra, 102 N.J. at 106. Confidentiality furthers that interest by shielding the recommendations, opinions, and advice of executive policy makers from exposure. It is the "government's need to conduct its administrative affairs with skill, with sensitivity to the privacy interests involved, and in an atmosphere of confidentiality that encourages the utmost candor" that confidentiality would protect in this case. Id. at 107.

The court notes that the "compelling and substantial" standard enunciated above is, in essence, identical in substance and application to the common-law balancing test. Applying the common-law balancing test, the court also finds that the interest of NJDPM in seeking the release of these draft reports and regulations is outweighed by the interest of the NJDOC in withholding these documents. However, as noted in the review of documents in section 4 of this opinion, any drafts or portions thereof that have been adopted, do not fall within the deliberative process privilege, and should be released. It shall be the obligation of the NJDOC to review all of the draft regulations and to identify those section(s), if any, that have been adopted and are therefore subject to release.

## **B. DISCLOSURE OF INTER-OFFICE COMMUNICATIONS**



The new Right to Know Law, N.J.S.A. 47:1A-1.1, provides that government records “shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.” N.J.S.A. 47:1A-1.1. Only those documents that are deliberative or consultative in nature are exempt. Any factual information that is unrelated to the deliberative or consultative process must be disclosed. Against this backdrop, the court is required to evaluate each document to ascertain: (1) whether the document includes deliberative or consultative material and (2) whether the document includes factual information that is not deliberative or consultative in nature. Any and all documents that include purely factual information must be released unless protected by Executive Order #26, provisions of the New Jersey Administrative Code or any other statutory provision that provides for nondisclosure. Additionally, the court will apply, as necessary, the common-law balancing test to determine whether any of the documents in whole, or in part, should be released.

### **C. DISCLOSURE OF THE CAPITAL SENTENCING UNIT MINUTES**

The NJDOC asserts that the deliberative process privilege, Executive Order #26 and sections of the New Jersey Administrative Code protect the disclosure of sections of the Capital Sentencing Unit Minutes. As noted heretofore, the NJDOC recently amended the index of privileged documents and has released many of the CSU minutes, some of which have been redacted to remove information that the NJDOC represents would jeopardize the safety of the inmate(s), staff or the security of the institution. In determining the release of these documents or the propriety of the redaction by the NJDOC, the court has applied the standards set forth herein with reference to the deliberative process privilege and evaluated the concerns expressed by the NJDOC that

are set forth in Executive Order #26 and portions of the Administrative Code. As noted heretofore, the court has also applied the common-law balancing test in determining whether the documents should be released.

**D. DISCLOSURE OF THE EXECUTION MANUALS FROM VIRGINIA AND ILLINOIS SUBJECT TO RELEASE**

To support the non-disclosure of the execution manuals from the States of Virginia and Illinois, the NJDOC relies primarily on the deliberative process privilege. According to the NJDOC, the department requested these documents from the officials of those states when it considered and explored death penalty procedures. The court finds that the Execution Manuals fall within the deliberative process privilege and, subject to the provisions set forth herein, are not subject to release. Similarly, the court finds that the documents are protected from release based on the provisions of paragraph 4(d) of Executive Order #26.

The record reflects that the execution manuals were considered by the NJDOC as part of the process of formulating New Jersey's death penalty procedures. As such, these documents fall within the protection of the deliberative process privilege.

This court accepts the representations of high-ranking officials in both states who, in sworn certifications, have indicated that the release of these manuals would compromise the security and safety of its institutions and facilities.

It is my opinion as a correctional administrator (State of Illinois) with approximately 26 years of experience that the disclosure of un-redacted copies of these documents would substantially impair security at Illinois' three condemned units, prior to and during an execution, and could facilitate an escape attempt or disturbance...**It is essential to security that details of this nature remain confidential and not be disclosed**

[Affidavit of George Wellborn, pages 2 and 3, dated July 19, 2002 (emphasis added).]

I have serious security issues with the VDOC Execution Manual being released to the general public. **The information contained in the manual is vital to the security of our agency, our employees, and inmates housed in VDOC facilities.**

**The VDOC will be reluctant in the future to share such information with other states** or other correctional agencies if something of this nature becomes public record.

[Affidavit of Gene M. Johnson, Deputy Director for the Divisions of Operations, Virginia Department of Corrections, since 1989, page 2, dated July 30, 2002 (emphasis added).]

Paragraph 4(d) of Executive Order #26, provides:

(d) records of a department or agency in the possession of another department or agency when those records are made confidential by a regulation of that department or agency adopted pursuant to N.J.S.A. 47:1A-1 et seq. and Executive order No. 9 (Hughes 1963), or pursuant to another law authorizing the department or agency to make records confidential or exempt from disclosure.

This court is satisfied that the language set forth in Executive Order #26 is sufficiently broad to protect the confidential information provided to a government agency within the State of New Jersey by a governmental entity of another State.<sup>9</sup>

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<sup>9</sup> See affidavit of Donald Zoufal, Chief Legal Counsel of the Illinois Department of Corrections, dated July 24, 2002 that, in pertinent part, states "there is an exemption contained in FOIA which applies to the Department's 1983 Condemned Unit and Execution procedures which are in the possession of the New Jersey Department of Corrections. 5 ILCS 140/7(1)(e) provides that '[r]ecords that relate to or affect the security of correctional institutions and detention facilities shall be exempt from inspection and copying under the FOIA provisions.'" See also, affidavit of Gene M. Johnson, Deputy Director of Operations, Virginia Department of Corrections, dated July 30, 2002 that, in

It is patently clear to the court that disclosure of the execution manuals would undoubtedly compromise the willingness of other states, in the future, to engage in the free and open exchange of information. The certifications of high-ranking officials within the Department of Corrections of the States of Virginia and Illinois establish that the information included in the execution manuals is confidential and that the states would not have provided these manuals to the State of New Jersey if they had been aware that the information would be disclosed.

Despite the confidential nature of these manuals, information has been provided, in the certification of Chief Legal Counsel from the State of Illinois, that the Execution Manual from the State of Illinois is available to the public in redacted form. Additionally, according to paragraph 7 of the certification of Chief Legal Counsel of the Illinois Department of Corrections, dated July 24, 2002, the 1983 Execution Manual has been provided to the NJDOC in its entirety and in redacted form. The court notes the following:

a copy of the 1983 Condemned Unit and Execution procedures which would be made publicly available under Illinois' FOIA, with the sensitive security information redacted, is attached hereto and may be substituted for the documents currently in the possession of the New Jersey Department of Corrections." (See Redacted version of the 1983 Condemned Unit and Execution procedures, a copy of which is attached hereto and made a part hereof as Exhibit "C").

[Certification of Donald Zoufal.]

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pertinent part, states "pursuant to Va. Code Section 2.2-3705(A)(69), any documents that would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure are excluded from being released in a FOIA request."

In the spirit of cooperation and since the manual from the State of Illinois is available to the NJDOC in redacted form, the court directs that the redacted document be released to NJDPM.

The court assumes, since no information to the contrary has been provided, that an un-redacted manual from the State of Virginia is not in the possession or control of the NJDOC. As a result, the NJDOC has no obligation to produce a redacted copy. If the NJDPM finds that this document may be relevant to its rule-making challenge, it may apply to the State of Virginia for the release of this document.

## **PART V.**

### **REVIEW OF EACH DOCUMENT<sup>10</sup>**

#### **DOCUMENT 006**

The information redacted contains psychological information related to a CSU inmate and is protected from disclosure pursuant to Executive Order #26, ¶ 4(b)(1) and N.J.A.C. 10A:22-2.3(a)(1).

#### **DOCUMENT 007**

The lines redacted do not fall within the deliberative process privilege, Executive Order #26 or the Administrative Code and should be released.

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<sup>10</sup> Consistent with the legal analysis set forth herein, the court has evaluated the release of each document based on the deliberative process privilege, Executive Order #26, provisions of the New Jersey Administrative Code. Furthermore, for each document, the court has applied the common-law balancing test in accordance with the standards set forth in this opinion. If the court finds that a document falls within the deliberative process privilege, Executive Order #26 or the Administrative Code, unless otherwise stated, the court finds that the interest of NJDPM in the release of the document does not outweigh the interest of the NJDOC in its nondisclosure.

**DOCUMENT 008**

The lines redacted are factual in nature and do not fall within the deliberative process privilege, Executive Order #26 or the Administrative Code and should be released.

**DOCUMENT 009**

Released in its entirety in the amended index of privileged documents.

**DOCUMENTS 010 & 011**

Memorandum, from D. Hutchinson to file dated January 9, 1996 entitled "Ethical concerns of Medical Services Unit of DOC over" is not subject to disclosure under the deliberative process privilege. The document consists of advice from NJDOC health care professionals concerning the role of the health care provider in the context of carrying out a court-ordered death sentence, expresses the opinion of the writer and also contains recommendations regarding the proposed amendments to the administrative code.

**DOCUMENT 012**

Released in its entirety in the amended index of privileged documents.

**DOCUMENT 013**

Released in its entirety in the amended index of privileged documents.

**DOCUMENT 014**

The lines redacted contain psychological information protected by Executive Order #26 and N.J.A.C. 10A:22-2.3(a)(1)

**DOCUMENT 015**

The lines redacted are factual in nature and do not fall within the deliberative process privilege, Executive Order #26 or provisions of the Administrative Code and should be released.

**DOCUMENT 016**

The three lines redacted are factual in nature and do not fall within the deliberative process privilege, Executive Order #26 or provisions of the Administrative Code and should be released.

**DOCUMENTS 017 - 029**

Released in its entirety in the amended index of privileged documents.

**DOCUMENTS 030 - 035**

The lines redacted include specific recommendations regarding proposed administrative regulations and execution procedures that fall within the deliberative process privilege.

**DOCUMENTS**

**036, 047, 049, 050, 051, 053, 055**

**056, 060, 061, 062, 063 & 064**

Inter-office communication cover sheets addressed to personnel within the NJDOC, dated May 23, 1996 and July 12, 1996 do not include any recommendations, opinions or advice and are merely factual in nature. These are not protected by the deliberative process privilege. However, to protect the identity of the individual who either approved or disapproved of the change(s), the name on each cover sheet should be redacted.

**DOCUMENTS**

**037, 038, 039, 040, 041, 043, 044, 045**

**046, 048, 052, 054, 057, 058 & 059**

A series of draft regulations and/or reports, sent with the cover letters referred to in the immediately preceding section, that contain suggestions and or annotations noted

in the margins to reflect changes and/or recommendations to the proposed regulations. These draft regulations fall within the deliberative process privilege and should not be released. However, portion(s) of the draft regulations that have been adopted are not entitled to protection under the deliberative process privilege and should be released.

The DAG is directed to review each and every draft regulation to ascertain whether any portion or portions, at any time were adopted. The adopted portions of these documents should be released.

#### **DOCUMENTS 065 & 066**

Inter-office communication from the Special Assistant Commissioner of NJDOC to Sandra Haley, Standards Development Unit, dated July 1, 1996 regarding comments to proposed re-adoption with amendments to N.J.A.C. 10A:23. This document sets forth more than a dozen specific recommendations regarding the content and language of the proposed amendments and falls within the deliberative process privilege.

#### **DOCUMENTS 067 & 068**

Inter-office memorandum, entitled N.J.A.C. 10A:23 – Lethal Injection, from Kathleen C. Wiechnik, Special Assistant to the Commissioner, to Sandra Haley and Karen Wells, dated July 22, 1996. This document includes comments and recommended changes regarding specific provisions of the lethal injection regulations. These comments and recommendations fall within the deliberative process privilege.

#### **DOCUMENT 069**

Inter-office communication from Willis E. Morton, Administrator, New Jersey State Prison, to Sandra E. Haley, Standards Development Unit, dated June 14, 1996 entitled, “Proposed Re-adoption with Amendments of N.J.A.C. 10A:23.” The clerical



recommendations are factual in nature and do not involve policy recommendations. This document should be released in its entirety.

**DOCUMENTS 070 - 073**

Memorandum from Karen J. Wells, Supervisor, to Stan Repko, Director, that provides a summary from the Rule Action Meeting held at the Office of the Counsel to the Governor with high-ranking officials of the Governor's Office and the NJDOC on January 02, 2001 regarding the re-adoption of N.J.A.C. 10:23. The lines that have been redacted contain specific recommendations by those present at the Rule Action meeting as it relates to the proposed re-adoption of administrative regulations. The redacted information falls within the deliberative process privilege.

**DOCUMENTS 074 & 75**

Memorandum from Karen Wells dated January 22, 2001 regarding re-adoption of Lethal Injection regulations that contain specific recommendations regarding proposed regulations. These documents are protected from disclosure pursuant to the deliberative process privilege.

**DOCUMENTS 76 & 77**

These pages consist of draft regulations with handwritten comments listed in the margins and are protected pursuant to the deliberative process privilege. However, any portion(s) (with the handwritten comments redacted) that have been adopted should be released.

**DOCUMENTS 078 - 0182**

These pages consist of the Execution Manuals provided to the NJDOC by the States of Virginia and Illinois. As noted in this opinion, the court finds that these

documents fall within the deliberative process privilege and paragraph 4(d) of Executive Order #26.

Despite this finding, the court directs that the redacted manual from the State of Illinois be provided. In reference to the manual from the State of Virginia, unless the State of New Jersey has a redacted copy, the NJDOC is under no obligation to provide a copy. If NJDPM wants to secure a copy of the execution manual from the State of Virginia, they can apply to that State for its release.

#### **DOCUMENTS 183 & 184**

Inter-office communication from Stan Repko, Acting Assistant Commissioner, Division of Policy and Planning to Assistant Commissioner Gary Hilton, dated May 6, 1983 entitled “the Development of Policies and Procedures for Housing and Maintaining inmates under sentence of death.”

None of the redacted lines fall within the deliberative process privilege or are protected from non-disclosure under Executive Order #26 or the Code. As a result, both should be released.

#### **DOCUMENTS 185 - 187**

Minutes or Agenda of Development of Policies and Procedures for Capital Sentence Inmates held on May 9, 1983 at Trenton State Prison. The information is factual, as opposed to deliberative in nature, does not fall within the deliberative process privilege and should be released.

#### **DOCUMENT 188**

Minutes of meeting held at the office of Gary Hilton on June 22, 1983 with representatives of the NJDOC regarding medical procedures for death by lethal injection.

The five redacted lines contain factual information as opposed to recommendations, opinions or advice and should be released.

#### **DOCUMENT 189**

Minutes of meeting held on May 23, 1983 with the NJDOC representatives entitled "Pharmacological concerns regarding execution by lethal injection." The lines redacted in paragraph one and two do not fall within the deliberative process privilege and are not protected from release in Executive Order #26 or the Code and should be released.

#### **DOCUMENT 190**

Capital Sentencing Unit Minutes of May 23, 1983. The information is factual in nature and does not fall within the protection of the deliberative process privilege, Executive Order #26 or the Code. This document should be released.

#### **DOCUMENT 191**

Released in its entirety in the revised index of privileged documents.

#### **DOCUMENT 192**

Minutes of meeting held on May 23, 1983 with staff members of the NJDOC entitled "Pharmacological concerns regarding execution by lethal injection." The redacted information is factual in nature and does not fall within the deliberative process privilege, Executive Order #26 or the Code and should be released.

#### **DOCUMENT 193**

Minutes of the Capital Sentencing Unit Committee dated June 3, 1983. The information is factual in nature and does not fall within the deliberative process privilege, Executive Order #26 or the Code and should be released.

#### **DOCUMENT 194**

Released in its entirety in the revised index of privileged documents.

#### **DOCUMENT 195 - 197**

Draft Capital Sentence Unit training curriculum consisting of three pages. These three pages reflect the development of a training curriculum and are factual, rather than deliberative, in nature and should be released.

#### **DOCUMENT 198**

Inter-office communication from Alan C. Koenigsfest, Health Services Coordinator, to Gary J. Hilton, Assistance Commissioner, dated July 6, 1983. The information is factual, rather than deliberative in nature and should be released.

#### **DOCUMENT 199 - 205**

These pages consist of draft CSU standards regarding lethal injection and death sentence procedures and fall within the protection of the deliberative process privilege. However, any portion(s) of the draft that have been adopted should be released.

#### **DOCUMENT 206**

Inter-office communication from Elaine W. Ballai, Esq., Special Assistant for Legal Affairs, to Capital Sentence Unit Committee. In essence, a one-sentence cover letter, the information is factual in nature and should be disclosed.

#### **DOCUMENTS 207 - 215**

Second Draft (partial) of lethal injection procedures contains recommendations, comments and notations in the margins and is exempt under the deliberative process privilege. However, any portion(s) of the draft that have been adopted should be released.

#### **DOCUMENT 216**

Inter-office communication from Executive Assistant, Division of Adult Institutions, to Special Assistant for Legal Affairs entitled "Department Standards 143.11." This document includes recommendations regarding the proposed amendments to the administrative code and is exempt under the deliberative process privilege.

#### **DOCUMENTS 217 – 226**

Draft Lethal Injection Procedures, dated July 7, 1983, with notations on a few pages. This document falls within the deliberative process privilege. However, any portion(s) of the draft that have been adopted should be released.

#### **DOCUMENT 227**

Inter-office communication from Elaine W. Ballai, Esq., to Sally Scheidemantel, Executive Assistant, Division of Adult Institutions, dated July 21, 1983, that includes specific comments and recommendations by Assistant Commissioner Hilton to the proposed Department Standards 143.11, Lethal Injection Standards. This document falls within the deliberative process privilege.

#### **DOCUMENTS 228 - 237**

Draft Standards 143.11, entitled "Lethal Injection – Procedures," dated July 27, 1983. This document is identified as a draft and contains recommendations regarding proposed procedures along with handwritten comments and falls within the deliberative process privilege. However, any portion(s) of the draft that have been adopted should be released.

#### **DOCUMENT 238**

Inter-office communication is in essence a cover letter, from Elaine W. Ballai, Esq., to CSU Committee Members, dated August 11, 1983. This document is purely factual in nature and does not contain any specific recommendations, advice or opinions. This document should be released.

#### **DOCUMENTS 239 - 248**

Draft of Lethal injection procedures, dated August 11, 1983, that includes specific recommendations and handwritten notations that falls within the deliberative process privilege. However, any portion(s) of the draft (with notations redacted) that have been adopted should be released.

#### **DOCUMENT 249**

Inter-office communication from Alan C. Koenigsfest, Health Services Coordinator, to Gary J. Hilton, Assistant Commissioner, dated August 15, 1983, entitled "Death by Lethal Injection." This one page, five-line letter, is factual in nature, does not fall within the deliberative process privilege and should be released.

#### **DOCUMENTS 250 - 256**

Draft of Lethal Injection Standards referred to in Document 249. This document is a draft and falls within the deliberative process privilege. However, any portion(s) of the draft (with notations redacted) that have been adopted should be released.

#### **DOCUMENTS 257 - 259**

These pages are not included in the original or revised index to privileged documents or the list of documents released to NJDPM. If these documents exist and have already been released, the NJDOC should so advise the court. If these documents

exist but have not been provided to NJDPM, the NJDOC shall either release these documents or provide the court with a specific reason for their nondisclosure.

#### **DOCUMENTS 260 - 265**

Inter-office Communication from Stan Repko, Deputy Director Division of Policy and Planning to Chairman of Capital Sentence Committee, dated August 8, 1983, along with his report on the visit to Death Row Unit at Menard Correctional Center in Chester, Illinois. Although this information, to a large extent contains factual information, the information originates from the State of Illinois and may include confidential information from that State.

The court finds that applying the common law balancing test, the NJDOC has established by clear and convincing evidence that the interest of the NJDOC outweighs any interest by the NJDPM in the release of this document. Furthermore, based on the findings by this court, the redacted Execution Manual from the State of Illinois will be released in redacted form.

#### **DOCUMENTS 266 & 267**

These pages are not included in the original or revised index to privileged documents or the list of documents released to NJDPM. If these documents exist and have already been released, the NJDOC should so advise the court. If these documents exist but have not been provided to NJDPM, the NJDOC shall either release these documents or provide the court with a specific reason for their nondisclosure.

#### **DOCUMENT 268**

Inter-Office communication from Elaine W. Ballai, Esq., Special Assistant for Legal Affairs, to members of the Capital Sentence Unit Committee, dated October 3,

1983 regarding the development of News Media Standards. The document is merely a cover letter that contains factual information and should be disclosed.

#### **DOCUMENT 269**

Draft referred to in DOC 268. This contains specific recommendations, suggestions and draft regulations that fall within the deliberative process privilege. However, any portion(s) that have been adopted should be released.

#### **DOCUMENTS 270 - 272**

Inter-office communication from Elaine W. Ballai, Esq., Special Assistant for Legal Affairs, to William H. Fauver, Commissioner, Gary J. Hilton and members of the Capital Sentence Unit, dated October 31, 1984, entitled "Lethal Injection Forms." These pages contain suggested forms for use with execution procedures.

Document 270, a one-page inter-office communication that is factual in nature, contains no deliberative process privilege material and should be disclosed.

Documents 271 and 272, however, consist of the draft of forms that fall within the deliberative process privilege. However, any form(s) that have been adopted should be released.

#### **DOCUMENT 273**

Released in its entirety in the amended index of privileged documents.

#### **DOCUMENT 274**

The redacted information is factual in nature and does not fall within the deliberative process privilege, Executive Order #26 or provisions of the New Jersey Administrative Code. The information should be released.



**DOCUMENT 275**

The one line that has been redacted is factual in nature, is not covered by the deliberative process privilege, Executive Order #26 or provisions of the Administrative Code. This document should be released.

**DOCUMENT 276**

Inter-Office communication from Gary J. Hilton, Assistant Commissioner to Howard L. Beyer, Trenton State Prison Administrator dated March 31, 1988, entitled "Capital Sentence Unit, Recommended Changes." This document, in its entirety, reflects changes that have been approved for the CSU, are factual in nature, and do not fall within the deliberative process privilege, Executive Order #26 or provisions of the New Jersey Administrative Code and should be released.

**DOCUMENT 277**

The redacted portions from the Capital Sentence Unit Committee minutes, dated March 22, 1989, paragraphs 2 and 3, contain factual information that is not covered by the deliberative process material, Executive Order #26 or provisions of the Code. This document should be released.

**DOCUMENT 278**

The redacted portions from the Capital Sentence Unit Committee minutes, dated March 22, 1989, contain factual information not covered by the deliberative process privilege, Executive Order #26 or the Code. These portions should be released.

**DOCUMENT 279**

Released in its entirety in the revised index of privileged documents.

**DOCUMENT 280**

The three redacted lines from the Capital Sentence Unit Committee Minutes, dated February 6, 1990, are factual in nature and are not covered by the deliberative process privilege. This document should be released.

**DOCUMENT 281**

The lines that have been redacted in paragraphs 5 and 7 do not fall within the deliberative process privilege, Executive Order #26 or the protection of the New Jersey Administrative Code and should be released.

**DOCUMENT 282**

The two lines redacted contain information related to the psychological status of an inmate and fall with the protection of Executive Order #26 and N.J.A.C. 10A:22 - 2.3 (1) and are not subject to disclosure.

**DOCUMENT 283**

The two lines redacted contain factual information that is not covered by the deliberative process privilege and should be released.

**DOCUMENT 284**

Released in its entirety in the revised index of privileged documents.

**DOCUMENT 285**

Released in its entirety in the revised index of privileged documents.

**DOCUMENT 287**

Inter-office communication from Kathleen C. Wiechnik, Special Assistant to the Commissioner to Elaine Ballai, Regulatory Officer, Standards and Development Unit, dated October 23, 1991, entitled 'N.J.A.C. 10A:16, Medical and Health Services.' This

document contains specific recommendations and advice regarding the adoption of administrative regulations and falls within the deliberative process privilege.

#### **DOCUMENT 288**

Inter-office Communication cover letter from Elaine W. Ballai, Esq., dated October 2, 1991, to officials within the NJDOC that contains purely factual information and does not fall within the deliberative process privilege. This document should be released.

#### **DOCUMENTS 289 - 297**

Draft from Elaine W. Ballai, Esq., dated October 2, 1991, to numerous NJDOC officials relating to the Proposed Re-adoption of Amendments to the Administrative Code, Medical and Health Services. This document contains a draft of proposed regulations and falls within the deliberative process privilege. However, any portion(s) of the draft that have been adopted should be released.

#### **DOCUMENT 298**

Released in its entirety in the revised index of privileged documents.

#### **DOCUMENT 299**

Inter-office memorandum from Thomas D. Farrell to Richard Miller, dated February 7, 1982, regarding Capital Sentence Unit Committee. The information in this document does not fall within the deliberative process privilege, Executive Order #26 or provisions of the Administrative Code and should be released.

#### **DOCUMENT 300**

Administrative Policy proposal/adoption includes a form that is factual in nature and is not covered by the deliberative process privilege. This document should be released.

#### **DOCUMENTS 301 - 307**

Inter-office communication, cover letter, from Elaine W. Ballai, Esq., dated February 24, 1992 signed by a Deputy Attorney General. The document should be released, however, the handwritten comments should be redacted.

#### **DOCUMENTS 302 - 307**

Draft of proposed amendments dated February 24, 1992. These draft regulations fall within the deliberative process privilege. However, any portion(s) of the draft that have been adopted should be released.

#### **DOCUMENT 308**

Inter-office communication from Elaine W. Ballai, Esq., dated March 20, 1992 to several NJDOC officials regarding the proposed re-adoption of administrative regulations with amendments. This document is purely factual and should be released.

#### **DOCUMENT 309 - 343**

Proposed draft of administrative regulations dated March 20, 1992, from Elaine W. Ballai, Esq., to Commissioner William H. Fauver and other high-ranking NJDOC officials. This document falls within the deliberative process privilege. However, any portion(s) of the draft that have been adopted should be released.

#### **DOCUMENT 344**

Released in its entirety in the revised index of privileged documents.

**DOCUMENT 345**

None of the five lines contained on this page contain deliberative process information or information protected by Executive Order #26 or the New Jersey Administrative Code. Therefore, the document should be released in its entirety.

**DOCUMENT 346**

Released in its entirety in the revised index of privileged documents.

**DOCUMENT 347**

Released in its entirety in the revised index of privileged documents.

**DOCUMENT 348**

The redacted information from the Capital Sentence Unit Annual Meeting, dated February 9, 1994, (comprising of approximately 25% of the page) consists of information specifically protected by Executive Order #26 and N.J.A.C. 10A:22-2.3(a)(1).

**DOCUMENT 349**

The two redacted lines from the Capital Sentence Unit Annual Meeting, dated February 9, 1994, contain factual information not protected by the deliberative process privilege. This document should be released.

**DOCUMENT 350**

Draft and memorandum dated July 15, 1998 on stationary from the Governor's Office, entitled "Departmental Proposed Amendments to N.J.S.A. 2C:49." The memorandum does not include the name of the author or to whom it is being sent. It does, however, contain specific recommendations to proposed statutory changes and falls

within the deliberative process privilege. However, any portion(s) that have been adopted should be released.

**DOCUMENT 351**

Memorandum from Howard Beyer, Assistant Commissioner, to Anne Paskow, Assistant Attorney General, Chief, Appellate Bureau, dated July 15, 1998 entitled "Departmental Proposed Amendments to N.J.S.A. 2C:49." This document contains specific recommendations by officials of the NJDOC regarding the proposed amendments that fall within the deliberative process privilege.

**DOCUMENT 352**

Released in its entirety in the revised index of privileged documents.

**DOCUMENT 353**

Released in its entirety in the revised index of privileged documents.

**DOCUMENT 354**

The two redacted lines in a memorandum from Anne Paskow, Assistant Attorney General, to Howard Beyer, Assistant Commissioner, dated July 28, 1998, are not protected by the deliberative process privilege and should be released.

**DOCUMENTS 355 & 356**

Both documents consist of proposed draft amendments to N.J.S.A. 2C:49 and fall within the deliberative process privilege. However, any portion(s) adopted should be released.

**DOCUMENTS 357 & 358**

Memorandum from Anne Paskow, Assistant Attorney General, to Howard Beyer, Assistant Commissioner, dated August 18, 1998 identifies specific departmental reasons for the proposed amendments to N.J.S.A. 2C:49 and are therefore exempt from disclosure under the deliberative process privilege.

#### **DOCUMENTS 359 - 361**

These documents are not included in the original or revised index to privileged documents or the list of documents released to NJDPM. If these documents exist and have already been released, the NJDOC should so advise the court. If these documents exist but have not been provided to NJDPM, the NJDOC shall either release these documents or provide the court with a specific reason for their nondisclosure.

#### **DOCUMENT 362**

Memorandum from Anne Paskow, Assistant Attorney General, to Death Penalty Protocols Executive Working Group, dated September 4, 1998, is a cover letter that contains factual, rather than deliberative material, and is not protected by the deliberative process privilege. This document should be released.

#### **DOCUMENTS 363 & 364**

This document contains specific recommendations regarding proposed amendments to N.J.S.A. 2C:49-2, N.J.S.A. 2C:49-3 and N.J.S.A. 2C:49-9 and falls within the deliberative process privilege. However, any portion(s) that have been adopted should be released.

#### **DOCUMENT 365**

Memorandum from Howard L. Beyer, Assistant Commissioner, dated August 18, 1998 entitled "Departmental Reasons for Proposed Amendments to N.J.S.A. 2C:49

(Capital Punishment).” This document contains specific recommendations and advice regarding changes to proposed legislation and falls within the deliberative process privilege.

#### **DOCUMENTS 366 - 368**

Draft regulations regarding statutory changes to the Death Penalty Statute. These fall within the deliberative process privilege. However, any portion(s) that have been adopted should be released.

#### **DOCUMENT 369**

Memorandum from Anne Paskow, Assistant Attorney General, to Death Penalty Protocols Executive Working Group, dated September 4, 1998 regarding proposed amendments to N.J.S.A. 2C:49-1 et seq. This document is a cover letter that is factual in nature and not protected by the deliberative process privilege.

#### **DOCUMENTS 370 - 372**

These documents contain specific recommendations and draft amendments that are exempt under the deliberative process privilege. However, any portion(s) that have been adopted should be released.

#### **DOCUMENTS 373 & 374**

These pages are not included in the original or revised index to privileges documents or the list of documents released to NJDPM. If these documents exist and have already been released, the NJDOC should so advise the court. If these documents exist but have not been provided to NJDPM, the NJDOC shall either release these documents or provide the court with a specific reason for their nondisclosure.

#### **DOCUMENT 375**



E-mail from Karen Wells to Yvonne Lemane, entitled "A-2439 An Act Concerning Executions and Amending N.J.S.A. 2C:49-7." This e-mail, although undated, contains comments regarding changes to proposed legislation and falls within the deliberative process privilege.

**DOCUMENT 376**

Memorandum from Loretta O'Sullivan, Legislative Liason, to Howard L. Beyer and Kathy Wiechnik, dated September 22, 1998, entitled "A-2439 – Allows family members of the murder victim to attend the condemned person's execution." This document is purely factual and does not fall within the deliberative process privilege. This document should be released.

**DOCUMENT 377**

Cover page of Assembly, No. 2439, introduced September 17, 1998. This document does not fall within the deliberative process privilege and should be released.

**DOCUMENT 378**

This document contains specific recommendations by the author and significant handwritten notations in the margin regarding proposed legislation. Since it contains recommendations of the author (who appears to be a high-ranking NJDOC official) it falls within the deliberative process privilege.

**DOCUMENT 379**

This page appears to be a copy of legislation introduced on September 17, 1998. Other than a small notation "ok" by one of the paragraphs, it represents actual legislation introduced and does not contain suggested changes and or recommendations. As a result, it does not fall within the deliberative process privilege and should be released.

**DOCUMENT 380**

This is a cover letter that is factual in nature and is not protected by the deliberative process privilege. This document should be released.

**DOCUMENT 381**

This appears to be the first page of legislation that was introduced on September 17, 1998 and is not protected by the deliberative process privilege. This document should be released.

**DOCUMENT 382**

This appears to be a page of legislation introduced on September 17, 1998 and is not protected by the deliberative process privilege. The handwritten comments in the margin(s) should be redacted, and the document released.

**DOCUMENT 383**

This appears to be a page of legislation introduced on September 17, 1998 and is not protected by the deliberative process privilege. The handwritten comments in the margin should be redacted and the document released.

**DOCUMENTS 384-387**

Released in its entirety in the revised index of privileged documents.

**DOCUMENT 388**

The redacted lines in a Memorandum from Karen Wells, Standards and Procedures, to Howard Beyer, Assistant Commissioner, dated May 3, 1999, regarding pending legislation contain factual information and should be released.

**DOCUMENTS 389 - 396**

Released in its entirety in the revised index of privileged documents.

#### **DOCUMENT 397**

The redacted lines do not fall within the deliberative process privilege, Executive Order #26 or any section of the New Jersey Administrative Code. The entire document should be released.

#### **DOCUMENTS 398-402**

Released in its entirety in the revised index of privileged documents.

#### **DOCUMENTS IN VOLUME II**

##### **DOCUMENT 1**

This document consists of 16 pages, dated February 24, 1984, and is entitled Policy/Procedure, Lethal Injection. This document does not contain any redacted information and therefore does not require any review by this court.

##### **DOCUMENT 2**

This document, entitled Policy/Procedure: Lethal Injection, dated September 5, 2001 consists of fourteen pages. Lines have been redacted on page 5, paragraph 6c page 6, paragraph 7, page 9, paragraph 17, page 11, paragraph 21 (a) & (b) and paragraph 22(a) and page 14, parts of paragraph 30.

The lines redacted on page 5 should remain confidential because they contain information regarding the location of execution medications and the means by which that material can be accessed.

The lines redacted on the top of page 6 of the same document should remain confidential because they concern the staffing and security assignments at the entrance areas to the execution facility. The Department has an interest in maintaining the confidentiality of the procedures it uses to control access to the execution facility.

The lines redacted on page 11, paragraph 21 (a) and (b) should remain confidential because they contain information regarding the location of the execution medications and the means by which the material can be accessed.

The lines redacted on page 22 do not contain any information that, in the judgment of the court, relates to the storage or access to execution of medications or relate to the security of the institution or its staff. These lines should be released.

The lines redacted on page 14, the first paragraph in Section 30 contain information regarding the removal and storage of execution substances, medications and syringes which, if released, would jeopardize the security of the facility, staff and inmates.

The lines redacted on page 14, the second paragraph in Section 30 does not contain any information that, if released, would jeopardize the security of the facility, staff or inmates.

The information considered by the court to be confidential is protected pursuant to N.J.A.C. 10A:22-2.3(a)(2) as the redacted text deals with materials that if disclosed “could have a substantial adverse impact on the security or orderly operation of the correctional facility.”

### **DOCUMENT 3**

This document, entitled “Policy/Procedure: Capital Sentence Unit, effective date October 20, 1999, revised April 12, 2000” consists of twenty pages. Lines have been redacted on page 6, Section C, paragraphs 1 through 13, page 10, paragraph 3(c)(1), page 15, the third full paragraph, and several portions of page 17. The information redacted

under this section should be released as it does not involve security issues and will not disturb the orderly operation of the correctional facility.

The lines redacted on page 6, paragraphs 1 through 13 should be released as the information does not involve security issues and will not disturb the security or orderly operation of the correctional facility.

The lines redacted on page 10 should remain confidential since the material addresses controlling inmate access to the Capital Sentencing Unit and details the description and color of an access badge.

The lines redacted on page 15 should be released as it does not involve security issues and will not disturb the orderly operation of the correctional facility.

The lines redacted under the section entitled “Special Handling Recreation” paragraphs 2 (a) and (b) should remain redacted. This information contains specific times and may, if released, provide information that would jeopardize the security of the institution and/or disturb the orderly operation of the correctional facility pursuant to N.J.A.C. 10A:22-2.3(a)(2).

However, the remaining lines that have been redacted on page 17 should be released as they do not affect security issues and will not disturb the orderly operation of the correctional facility.

#### **DOCUMENT 4**

This document, entitled “Operational Procedures Number 105, Lethal Injection” is eleven pages. Lines have been redacted on pages 3, 4, 5, 6, 7, 8, and 11.

The NJDOC contends that the pages redacted in Document 4 should remain confidential inasmuch as the information relates to security and logistical issues seven

days prior to the execution date. NJDOC asserts that this time period represents a period when threats to the security and operation of the CSU are highest and that the information addresses the institution's methods for controlling entry and exit areas. As a result, the Department submits that this information should not be released as disclosure could have an adverse impact on the security of the correctional facility. To support this position, NJDOC relies on N.J.A.C. 10A:22-2.3(a)(2).

The court agrees with NJDOC's argument and therefore holds that the information redacted on page 3, 4, 6, 11 should not be released in accordance with the Code provision set forth above.

Page seven consists of nine separate paragraphs. In the first paragraph none of the information has been redacted. Beginning with paragraph 2, the court finds that paragraphs 2, 4, 5, 6, 7, 8 and 9 should not be released as the material provides detailed internal instructions to correctional staff that could have an adverse impact on the security of the correctional facility and the inmates confined in the CSU. However, paragraph 3, should be released as it does not involve security issues and will not disturb the orderly operation of the correctional facility

The court has carefully reviewed the paragraphs set forth on pages 8 and 9. Despite vague assertions that the information on these two pages, if released, would jeopardize the security of the facility, none of the redacted lines include information that, if released, could jeopardize the security or orderly operation of the facility. As a result, this information should be released.

The lines redacted on page 11 should remain confidential for security reasons.

## **DOCUMENT 5**

This document, entitled “Lethal Injection Checklist,” consists of Sections I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII and IXX. On October 7, 2002, during the telephone conference initiated by the court, the DAG assigned to handle this matter represented that the pages in the document skip from Section XIII to Section IXX and that Sections XIV, XV, XVI, XVII and XVIII do not exist. Based on this representation, the court directed that an appropriate certification be prepared and provided to the court and counsel. Although the court was never provided a copy of this certification, one was provided to counsel for NJDPM.

On October 18, 2002, counsel for NJDPM provided the court with a copy of a certification, signed by Hugh Downing, a Program Development Assistant with the NJDOC. According to Mr. Downing, the document entitled “Administrative Checklist” “contains a typographical error, the final page is erroneously enumerated at IXX and that page has been so revised as to remove the typographical error and the proper numerical sequencing has been asserted.” Despite the production of this certification, NJDPM has requested a hearing to resolve the issue of allegedly missing pages.

The court is satisfied, based on the certification of Mr. Downing and a review of the Administrative Checklist, that there is no need for a hearing and that the erroneous numbering of the pages has been cured. The information redacted in this section should or should not be disclosed as follows:

The lines redacted under Roman Numeral VI should not be released as the information concerns the storage and security of execution materials and, if released, could have an adverse impact on the secure and orderly operation of the correctional facility.

The information redacted under Roman Numeral IX should not be released as it relates to the security of the entrances and exits to the institution and, if released, could have an adverse impact on the security of the correctional facility.

The information redacted on Roman Numeral XI and Roman Numeral XIV should not be released because it concerns the securing and storing of execution materials and, if released, could have an adverse impact on the security of the correctional facility.

#### **DOCUMENT 6**

This document, entitled Execution Process Checklist, is three pages. The one line redacted on the last page of this document should remain confidential because it concerns security information and its release would compromise the effective and safe operation of the correctional facility.

#### **DOCUMENT 7**

This document is a drawing that is referred to as Partial Floor Plan, Block “C” renovations. The floor plan should remain confidential as its release could increase the risk of escape or interfere with the Unit’s safe and secure operation.

### **VI.**

#### **CONCLUSION**

Consistent with this opinion, NJDPM shall prepare and submit an order to the court within 10 days. Within 10 days thereafter, the NJDOC shall provide the NJDPM copies of the documents identified herein. This court does not retain jurisdiction.